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No. 06-984

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF *AMICI CURIAE* OF RANDY AND SANDRA ERTMAN AND THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

Attorney for Amici Curiae

QUESTIONS PRESENTED

Petitioner listed two questions in his petition for certiorari, rephrased in his brief as follows:

1. Did the President of the United States act within his authority when he determined that the states must comply with the United States's treaty obligation to give effect to the judgment of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2004 I.C.J. 12 (Mar. 31, 2004) (No. 128), in the cases of the 51 nationals of Mexico named in the judgment?

2. Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed?

Petitioner also briefed a third question in Part IV of his brief:

3. Is the application of the Texas successive petition statute in this case inconsistent with the *Avena* decision, and if so to what extent?

This brief *amici curiae* addresses this implicit third question.

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INTEREST OF *AMICI CURIAE*[1]

Randy and Sandra Ertman are the parents of Jennifer Ertman, one of the victims in this case. Jennifer was just 14 years old when she was raped and murdered by José Medellín and his gang. She would be 29 now. Her parents have waited longer for justice to be done in this case than Jennifer lived her entire, much too short, life. Medellín's demand for yet more proceedings in this already exhaustively reviewed case

1. This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside monetary contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

is contrary to *amici*'s interest in seeing justice done without unreasonable delay. See 18 U. S. C. § 3771(a)(7).

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Petitioner Medellín claims that the State of Texas is required to give effect to the decision of the International Court of Justice in the *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128 (Judgment of Mar. 31). He further claims that giving effect to *Avena* requires that Texas disregard its procedural default rules altogether and reconsider *de novo* the question of whether he was prejudiced by the arresting authorities' failure to notify the Mexican Consulate of his arrest. He has already had a determination, on his first application, that he failed to show any prejudice. Nothing in *Avena* entitles him to a second determination of the same question. To the extent he makes new claims of prejudice which he failed to make in the proceeding that *followed* notification of the consulate, nothing in *Avena* prevents the State of Texas from applying its standard default rules to such claims. Delaying the already long-overdue execution of this well-deserved sentence and of sentences in similar cases would be contrary to the rights of victims of crime and the law-abiding public that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The Crime

Petitioner's statement of the case barely mentions the facts of the unspeakably brutal crimes committed by José Medellín and his pack of predators. See Brief for Petitioner 6. However, these facts are essential to understanding just how weak his claim of prejudice is. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 700 (1984) ("Given the overwhelming aggravating factors . . .").

On the night of June 24, 1993, 14-year-old Jennifer Ertman and 16-year-old Elizabeth Pena[2] were taking a shortcut home when they encountered a gang called the Blacks and Whites, including the petitioner, José Medellín. *Medellín* v. *State*, No. 71,997 (Tex. Crim. App., May 16, 1997), App. to Pet. for Cert. in *Medellín* v. *Dretke*, No. 04-5928, p. 4a (cited below as "Prior Cert. Pet. App.").[3] "When Elizabeth tried to run from appellant, he grabbed her and threw her to the ground. Elizabeth screamed for Jennifer to help her. In response to her friend's cries, Jennifer ran back to help, but [two other gang members] grabbed her and threw her down as well." *Ibid.* The group then proceeded to have "fun" by brutally gang raping both girls, and they bragged about it afterward. See *id.*, at 5a.

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2. Soft-pedaling the facts of the crime is standard practice in defense briefs, but counsel for petitioner has gone considerably beyond the norm by implying that the victims of this crime were adults. See Brief for Petitioner 6 ("murders of two young women"). Jennifer and Elizabeth were, in fact, teenage girls.

3. We understand that some of the documents from the prior case will be reprinted in an appendix to Respondent's Brief, but the pagination of this appendix was not available by the printing deadline for this brief.

"Appellant related to [the brother and sister-in-law of one of the gang members] that he sexually assaulted one of the girls and bragged about having 'opened' her since she apparently had been a virgin. As if to accentuate his conquest, appellant showed Christina his blood soaked underwear. Appellant related that after another gang member sexually assaulted the second girl, he 'turned her around' and anally raped her." *Ibid.* The gang murdered the girls to prevent them from identifying their attackers and divided up their possessions. See *id.*, at 5a-6a. Medellín personally "took off one of his shoelaces and strangled at least one of the girls with it." *Id.*, at 6a.

The evidence against Medellín included his written statement after arrest, in which he admitted substantial participation in the crimes, see *id.*, at 6a; J. A. in *Medellín* v. *Dretke*, No. 04-5928, pp. 14-18, including his personal participation in strangling Elizabeth. *Id.*, at 17. This statement was made between 5:54 a.m. and 7:23 a.m. on the day of his arrest, June 29, 1993. *Id.*, at 14-15. Medellín informed the authorities that he was born in Mexico in the same statement. See *id.*, at 15. Medellín was not advised that he had a right to have the Mexican Consulate notified, nor was the consulate notified.

The Case

Medellín was convicted of capital murder and sentenced to death, and the Texas Court of Criminal Appeals affirmed on direct appeal. Prior Cert. Pet. App. 3a. Six weeks after the affirmance, on April 27, 1997, Mexican consular authorities learned of the case and began providing assistance to Medellín. Brief for Petitioner 7. Eleven months later, on March 26, 1998, Medellín filed a state habeas corpus petition. Ground 3 of this petition is the Vienna Convention claim. Pages

25-28 of this petition contain the argument on enforceability of the treaty in the habeas proceeding and petitioner's standing to raise the claim. Pages 28-31 are the substantive argument, and this portion of the petition is reproduced in the Appendix to this brief. The only prejudice claimed is the obtaining and introduction of Medellín's confession.

Attached to and incorporated in the petition is an affidavit from the Consul General. The only prejudice from the Vienna Convention violation claimed by the Consul General was that, if they had been notified prior to interrogation, they would have advised him to assert his *Miranda* right to have counsel present during interrogation. Prior Cert. Pet. App. 172a-173a. The Consul General's affidavit does not make any claim that the consulate would have arranged for a more effective presentation of mitigating evidence at the penalty trial.

The trial court denied the habeas petition. In addition to procedural default and standing grounds, the state habeas judge also rejected Medellín's Vienna Convention claim on the merits:

> "16. In the alternative, the applicant fails to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; the applicant was provided with effective legal representation upon the applicant's request; and, the applicant's constitutional rights were safeguarded . . . ." Prior Cert. Pet. App. 56a.
>
> "17. The applicant . . . fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction or punishment. *Ex parte Barber*, 879 S. W. 2d 889, 891-92 (Tex. Crim. App. 1994) (holding that, in order to be entitled to habeas relief, defendant

> must plead and prove that complained-of error did, in fact, contribute to his conviction or punishment)." *Id.*, at 57a.

The Court of Criminal Appeals accepted the trial court's findings and conclusions on October 3, 2001. *Id.*, at 32a-33a.

Medellín filed a federal habeas petition on November 28, 2001, and amended it the following July. The petition raised Sixth Amendment and due process issues, in addition to the Vienna Convention issue. See *Medellín* v. *Cockrell*, No. H-01-4078 (SD Tex., June 25, 2003), Prior Cert. Pet. App. 62a. Like the state habeas court, the Federal District Court rejected the Vienna Convention claim on the merits as well as on procedural grounds.

> "The police officers informed Medellín of his right to legal representation before he confessed to involvement in the murders. Medellín waived his right to advisement by an attorney. Medellín does not challenge the voluntary nature of his confession. There is no indication that, if informed of his consular rights, Medellín would not have waived those rights as he did his right to counsel. Medellín fails to establish a 'causal connection between the [Vienna Convention] violation and [his] statements.' [Citation.] Petitioner has failed to show prejudice for the Vienna Convention violation." *Id.*, at 84a-85a (footnote omitted).

The Court of Appeals denied a certificate of appealability. *Medellín* v. *Dretke*, 371 F. 3d 270, 281 (CA5 2004). On the procedural default point, the Court of Appeals held it was bound by *Breard* v. *Greene*, 523 U. S. 371, 375 (1998) (*per curiam*), until such time as this Court overrules it. See 371 F. 3d, at 280. On the

question of standing, the panel followed circuit precedent. See *ibid.*

This Court granted certiorari. Later, on February 28, 2005, President Bush issued a memorandum stating that the United States would comply with the decision of the International Court of Justice "by having State courts give effect to the decision in accordance with general principles of comity . . . ." See Memorandum for the Attorney General (Feb. 28, 2005), App. to Pet. for Cert. 187a. On March 24, Medellín filed the present application in state court.

On May 23, this Court dismissed the writ of certiorari as improvidently granted, noting the numerous impediments in federal habeas to this claim. *Medellín* v. *Dretke*, 544 U. S. 660, 664-667 (2005) (*per curiam*). The Court noted that review of the state decision in the present case would remain available. See *id.*, at 666. The Texas Court of Criminal Appeals ordered briefing on whether Medellín met the requirements for a successive petition. *Ex parte Medellín*, 206 S. W. 3d 584, 586 (2005).

While the case was pending in the state courts, this Court decided *Sanchez-Llamas* v. *Oregon*, 548 U. S. __, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006), along with a companion case, *Bustillo* v. *Johnson*. In *Sanchez-Llamas*, the Court held that the Vienna Convention does not create a remedy of exclusion of evidence, and that absent such a requirement in the treaty itself the federal courts could not impose an exclusionary rule on the states. *Id.*, 126 S. Ct., at 2678-2682. In *Bustillo*, the Court held, notwithstanding *Avena*, "that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims." *Id.*, at 2687.

The Texas Court of Criminal Appeals decided the present case on November 15, 2006, on the basis of Texas's statutory successive petition rule, Section 5(a), Article 11.071 of the Texas Code of Criminal Procedure.[4] The Court held "that *Avena* and the President's memorandum do not preempt Section 5 and do not qualify as previously unavailable factual or legal bases." *Ex parte Medellín*, 223 S. W. 3d 315, 321 (Tex. Crim. App. 2006).

SUMMARY OF ARGUMENT

Petitioner contends that if the *Avena* decision is binding, the procedural default rules of Texas are completely preempted. As Justice Breyer noted in the *Bustillo* dissent, that would be an extreme interpretation of *Avena*. A reasonable interpretation is that procedural default rules are not preempted under

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4. (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

Avena unless the Vienna Convention violation itself caused the default.

In the present case, Medellín's first state habeas petition, filed with the assistance of the consulate, claimed only one form of prejudice—the obtaining and admission of his confession. The claim of prejudice he makes now—lack of assistance in making his case in mitigation—was defaulted *after* the consulate had actual notice. *Avena* does not preclude application of the standard default rules to this claim.

Medellín's confession claim has been addressed on the merits in alternative holdings by both the state and federal courts. Nothing in *Avena* requires a third review. Further, in light of *Sanchez-Llamas* and *Avena* itself, these rulings were manifestly correct.

Regardless of how the Court resolves the international law issues in this case, there is no need for a remand for further proceedings. This case has already gone on far too long and had far too many proceedings. This Court reviews judgments, not opinions. The judgment was correct and should be affirmed outright, bringing this case to an already overdue close.

ARGUMENT

I. *Avena* does not preclude application of Texas's standard default rules to any default occurring after the consulate received actual notice.

Petitioner contends, "The Texas procedural default statute, as interpreted and applied by the Texas Court of Criminal Appeals [to this case], is thus flatly inconsistent with the treaties requiring the United States to abide by the *Avena* decision . . . ." Brief for Petitioner 44. Analysis of this argument must begin with the

International Court of Justice's (ICJ) understanding of the procedural default rule. Quoting Mexico's argument, *Avena* defines the procedural default rule this way: " 'a defendant who could have raised, but fails to raise, a legal issue *at trial* will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of *habeas corpus*'." *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128, ¶111 (Judgment of Mar. 31) (*Avena*) (first emphasis added);[5] see also *id.*, ¶133. This is the trial default rule of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Presumably, the word "generally" in this definition recognizes the cause-and-prejudice and actual innocence exceptions. Significantly, *Avena*'s definition excludes defaults at stages of the proceedings later than trial. Statements in the *Avena* opinion referring to the "procedural default rule" therefore do not necessarily refer to later defaults, and they should only be extended to such defaults when the underlying rationale of the opinion so requires.

The underlying rationale of the procedural default holding is that no "provision has been made to prevent [the procedural default rule's] application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial." *Avena*, 2004 I. C. J. No. 128, ¶113. This rationale is flawed, and this Court rejected it in *Bustillo* v. *Johnson*,

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5. The opinion continues at that point: "The rule requires exhaustion of remedies, *inter alia*, at the state level and before a *habeas corpus* motion can be filed with federal courts." This is not technically correct. Exhaustion and procedural default are separate, although related, rules. See, *e.g.*, *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999); *id.*, at 850-851 (Stevens, J., dissenting).

decided with *Sanchez-Llamas* v. *Oregon*, 548 U. S. __, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006). When the state has provided or the defendant has retained competent counsel, the failure to inform does not preclude counsel from raising the Vienna Convention[6] issue. See *id.*, 126 S. Ct., at 2687, 165 L. Ed. 2d, at 584. When defense counsel is ineffective, that ineffectiveness is both cause for default and an independent claim for relief. See *Murray* v. *Carrier*, 477 U. S. 478, 488-489 (1986).[7]

If this Court should decide that the pertinent treaties or the President's memorandum requires the United States to accept this rationale despite its flaw, then *Carrier* provides the guide to accommodate *Avena* within the framework of American habeas corpus jurisprudence:

> "[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not '[conduct] trials at which persons who face incarceration must defend themselves without adequate legal assistance.' *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980). Ineffective assistance of counsel, then, is cause for a procedural default." 477 U. S., at 488.

Where the denial of assistance that defendant was entitled to receive is the cause of a default, that denial

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6. Vienna Convention on Consular Relations, Apr. 24, 1963, [1970] 21 U. S. T. 77, T. I. A. S. No. 6820.

7. In a federal habeas corpus petition filed long after the consulate had actual notice of the case, Medellín attacked trial counsel's performance on multiple grounds, but failure to raise the Vienna Convention issue and failure to contact the consulate himself were not among them. See Prior Cert. Pet. App. 62a, 68a-79a.

is sufficient for the cause prong of the *Sykes* test. If the Court accepts *Avena*'s assumption of a causal connection between the failure to notify the consulate and the default of the Vienna Convention claim, then the analogy is complete. *Strickler* v. *Greene*, 527 U. S. 263, 288-289 (1999) is similar, where the prosecutor's inadvertent nondisclosure of impeachment evidence was both an element of the petitioner's *Brady*[8] claim and cause for his failure to raise it in state court.

The violation-as-cause rationale only extends to defaults occurring before the violation is corrected. In *Gray* v. *Netherland*, 518 U. S. 152, 162 (1996), unlike *Strickler*, the evidence which had not been disclosed to defense counsel before trial was known to habeas counsel before he filed his state habeas petition. Hence, it was defaulted by failure to raise it in that proceeding. Similarly, failure to notify the consulate, or to inform the defendant of his right to have the consulate notified, has no causal connection to any default occurring after the consulate has actual knowledge, whether through official channels or any other means. *Avena* is concerned with cases where "application of the procedural default rule would have the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended', and thus violate paragraph 2 of Article 36." *Avena*, 2004 I. C. J. No. 128, ¶ 113. Once the consulate has actual notice, it is not prevented from assisting the defendant in presenting his Vienna Convention claim in the next available procedure, as in fact the consulate did in the present case, see Brief for Petitioner 7, and any prior lack of notice would not be cause for a default beyond that point. Cf. *Avena*, *supra*, ¶ 104 (no breach of duty to enable consulate to arrange representation in cases

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8. *Brady* v. *Maryland*, 373 U. S. 83 (1963).

where consulate learned of arrest, by whatever means, before trial). Application of the procedural default rule to a default occurring after actual notice would not be a violation of paragraph 2 of Article 36 as construed by *Avena*.

This is largely how the *Bustillo* dissent understood *Avena*. "[T]he ICJ understood the Convention to prevent application of the procedural default rule only where the arresting authorities' failure to inform the foreign national of his Convention rights brought about the procedural default in the first place." 126 S. Ct., at 2700 (Breyer, J., dissenting), citing *Avena*, *supra*, ¶ 113 (emphasis added). The dissent emphasized repeatedly that absent a causal link between the violation and the default, the state procedural default rules continue to operate without conflict with the Convention or the *Avena* decision. See *id.*, at 2698, 2700, 2702-2703, 2708.

To interpret *Avena* as preempting state procedural rules completely, as petitioner claims in this case, see Brief for Petitioner 9, 44, would be reading it and *LaGrand*[9] "as creating an extreme rule of law." *Bustillo*, *supra*, 126 S. Ct., at 2703 (Breyer, J., dissenting). *Avena* "nowhere forbids a state court conducting such a 'review' to bar claims not timely made provided the violation itself did not cause the delay." *Ibid.*, citing *Avena*, *supra*, ¶ 139. Consistently with *Avena*, then, a State may continue to apply its standard default rules to any claim not made at the first opportunity after the consulate's receipt of actual notice of the case.

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9. *LaGrand Case* (*F. R. G.* v. *U. S.*), 2001 I. C. J. 466 (Judgment of June 27).

II. All of petitioner's claims have been either considered on the merits or defaulted after actual notice, and the Texas court properly refused to hear the successive petition.

In his successive state habeas application, petitioner claimed that the State's noncompliance with the Vienna Convention deprived him of the assistance of the Mexican Consulate in building his case in mitigation at the penalty phase of his capital murder trial. See Subsequent Application for Post-Conviction Writ of Habeas Corpus in *Ex parte Medellín*, No. AP-75,207, pp. 36-44 (Tex. Crim. App.) (cited below as "Subsequent Application"). Not a word of this argument appears in his first state habeas petition, filed 11 months after the consulate had actual notice of the case. See Appendix to this brief. Application of the standard Texas rules to this claim violates neither the spirit nor the letter of the *Avena* decision. Like the *Brady* claim in *Gray*, while the violation itself may be considered "cause" not to raise it at trial or on direct appeal, there was no cause for failure to raise it in the first state habeas. Texas's standard procedural rules therefore remain applicable to that default, whether the State is obligated to comply with *Avena* or not.

"Nothing the State did or omitted to do here 'precluded counsel from . . . rais[ing]' " in the first state habeas proceeding the prejudice petitioner now claims. Cf. *Bustillo* v. *Johnson*, decided with *Sanchez-Llamas* v. *Oregon*, 548 U. S. __, 126 S. Ct. 2669, 2690, 165 L. Ed. 2d 557, 587 (2006) (Ginsburg, J., concurring in the judgment), quoting *Avena*, *supra*, ¶ 113. Therefore, even if this Court concludes that the Texas Court of Criminal Appeals erred in not treating *Avena* as binding, its judgment should still be affirmed as to all of Medellín's Vienna Convention claims, except the confession claim, on the ground that *Avena* does not

preempt the Texas statute as to these claims. "[T]his Court reviews judgments, not opinions . . . ." *Chevron U. S. A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984).

Petitioner's brief in this Court makes no mention of the only Vienna Convention claim he made in his first state habeas petition, *i.e.*, that his confession was the fruit of a Vienna Convention violation and had to be suppressed. That omission is not surprising, given that the *Avena* decision which is the central pillar of his argument also demolishes the confession claim. We will discuss it only briefly here, in case it comes up in the reply brief or at oral argument.

As noted *supra*, at 5-6, the state trial court did not rest its rejection of Medellín's Vienna Convention claims on procedural default alone. The court also held, "the applicant . . . fails to show that any non-notification of the Mexican authorities impacted on the validity of his conviction and punishments." See Prior Cert. Pet. App. 57a, ¶17. The Court of Criminal Appeals adopted this finding. See Prior Cert. Pet. App. 33a. Before *Avena* had even been decided, Medellín had already received the determination of prejudice he now claims to be entitled to. See *Ex parte Medellín*, 223 S. W. 3d 315, 33a, and n. 1 (Tex. Crim. App. 2006) (Hervey, J. concurring), citing Brief for Criminal Justice Legal Foundation as *Amicus Curiae*, available at http://www.cjlf.org/briefs/MedellinCCA.pdf.

Medellín made the same claim again in the Federal District Court. That court rejected the claim on multiple alternate grounds, including the merits. "Medellin fails to establish a 'causal connection between the [Vienna Convention] violation and [his] statements.' [Citation.] Petitioner has failed to show prejudice for the Vienna Convention violation." Prior Cert. Pet. App. 85a (footnote omitted).

The International Court of Justice (ICJ) did not render an individualized determination that the required review had not yet occurred in Medellín's case. In the court below, petitioner maintained that the ICJ had so held in paragraphs 112-113 of the *Avena* decision, see Subsequent Application 16, but it did not.

In paragraph 112, the ICJ recaps what it said about the procedural default rule in its previous opinion in *LaGrand*. After noting that LaGrand had been prevented from effectively challenging his judgment by the procedural default rule, the ICJ states, "This statement of the Court *seems* equally valid in relation to the present case, where *a number* of the Mexican nationals have been placed exactly in such a situation." *Avena*, 2004 I. C. J. No. 128, ¶ 112 (emphasis added). This equivocal statement does not even specify how many cases it refers to, much less which cases, and cannot be considered a holding in this specific case.

In paragraph 113, the court notes that the procedural default rule has not been revised since *LaGrand*, and "the procedural default rule *may* continue to prevent courts from attaching legal significance to the fact, *inter alia*, that the [Vienna Convention] violation . . . prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence." *Avena*, *supra*, ¶ 113 (emphasis added). The actual holding in paragraph 113 is that the ICJ will not consider whether there is a violation of the duty to provide a remedy until all judicial proceedings have concluded. The ICJ therefore did not examine the individual circumstances of any of the cases that had not yet reached that point, including Medellín's case. The United States has already discharged any obligation it may have to consider Medellín's confession claim, and *Avena* does not hold otherwise.

In addition, in light of *Avena* and *Sanchez-Llamas* v. *Oregon*, 548 U. S. __, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006), the rejection of the confession claim by the state and federal courts was clearly correct. The opinion of the Court in *Sanchez-Llamas* explains why suppression is not required by the Vienna Convention. See 126 S. Ct., at 2678-2682. Justice Ginsburg's concurring opinion explains why suppression was not required under *Avena*. See *id.*, at 2688-2689. There is no requirement that notification of the consulate precede questioning, and notification was not overdue at the time Medellín confessed. His confession and its subsequent introduction into evidence were not the fruit of the Vienna Convention violation.

To make a case for mandatory review of a defaulted claim of prejudice under *Avena*, the petitioner must establish two causal connections. First, the prejudice he claims must be the result of the Vienna Convention violation. Second, the earlier default of the claim must also be the result of the violation. At least one of these connections fails for each claim in this case. Medellín's confession was not the result of the violation. His failure to bring the claim of prejudice regarding preparation of his case in mitigation in his first habeas petition was not the result of the violation. Whether *Avena* is binding or not, Texas may lawfully apply its successive petition statute to deny further consideration of this case.

This case has produced much lofty discussion about international law and the separation of powers. We must not forget, though, that this case is about a real crime against real people. Even in the sordid company of other capital cases, this crime stands out as an act of exceptional, unspeakable savagery and depravity. Two teenage girls suffered unimaginable horrors at the hands of José Medellín and his pack of predators and

then had their young lives snuffed out when they had barely begun. Thirteen long years of litigation have followed the rendition of the thoroughly deserved judgment in this case, and most of that litigation has had nothing to do with Medellín's guilt of the crime. Enough is enough. Regardless of how the international law issue is decided, this case can and should end with this Court's decision.

CONCLUSION

The judgment of the Texas Court of Criminal Appeals should be affirmed.

August, 2007

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Amici Curiae

APPENDIX

IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS
AND
IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
339TH JUDICIAL DISTRICT

Ex parte José Ernesto Medellín	)	
Applicant	)	No. 675430-A
	)	

APPLICATION FOR WRIT OF HABEAS CORPUS

* * *

[p. 25]

B. VIOLATION OF THE VIENNA CONVENTION CONSULAR RELATIONS OF 1963

GROUND FOR REVIEW THREE: The failure to notify applicant of his rights to inform the Mexican Consulate of his arrest for capital murder, as mandated by international treaty, violated applicant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

* * *

[p. 28]

Additional Facts

Applicant was born in Mexico and remains a Mexican citizen. Although both his parents are legal immigrants, applicant did not immigrate with his parents. Instead he stayed in Mexico for a period of at least five years after his parents entry into the United States. He later moved to live with his parents in Houston. At the time of his arrest, applicant was eighteen years of age.

After obtaining an arrest warrant for applicant and arresting him, applicant was transported to the Houston Police Department. Applicant was not notified of his rights under the Vienna Convention to contact the Mexican Consular in Houston, nor was the consular contacted. Instead, authorities sought to interview applicant and to obtain a confession to a crime subject to the death penalty. Even after obtaining this confession, authorities did not advise applicant of his rights to contact the consular, and did not advise the consular of applicant's arrest. Had applicant been advised of his rights under the Vienna Convention, or had the Mexican Consular been contacted by authorities, the Consular would have taken steps to protect applicant's rights and to secure immediate representation for applicant.[38]

Argument

There can be no doubt that applicant's rights under the Vienna Convention were violated by the authorities' failure to advise him of his right to contact the Mexican

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38. Applicant specifically incorporates by reference "Exhibit J", a statement from the Mexican Consular, as if fully copied and set forth at length.

Consular. Likewise, there can be no doubt the authorities took no steps to protect these rights. Instead, the authorities immediately sought additional evidence against applicant. Evidence which was to be used to secure his conviction for capital murder and, ultimately to secure his execution. And, having been denied the rights guaranteed him, applicant provided such evidence in the form of a written confession.

There can be no reasonable excuse for this failure on the part of the authorities. The Vienna Convention was not recently ratified—the treaty was some thirty years old. The authorities had sufficient time to secure an arrest warrant and they coordinated a multiple arrest using many officers. The persons arrested were separated and individual officers interviewed them. The only expediency which existed was that of the authorities in seeking a confession.

Authorities are now well versed in the constitutional rights which must be accorded every individual. Indeed, after a period of dark history in our criminal jurisprudence, the Supreme Court sought to ensure that no person be subjected to police interrogation without at least the benefit of the knowledge of their guaranteed rights under the United States Constitution. ***Miranda v. Arizona***, 384 U.S. 436 (1966). Indeed, the Court held that mere knowledge of these rights was insufficient—such rights must be knowingly and intelligently waived before a person is to be subjected to police interrogation. Id., 384 U.S. at 444. ***See also***, ***Moran v. Burbine***, 476 U.S. 412, 421 (1986); ***Colorado v. Connelly***, 479 U.S. 157, 170 (1986); ***and***, ***United States v. Cooper***, 949 F.2d 737, 742 n. 14 (5th Cir. 1991).

The right to knowledge and access to a Consular for a foreign national is no less important than the right to

an attorney or the right to remain silent.[39] A foreign national in the custody of authorities of a foreign country is no less intimidated than one of our own citizens in custody. And the importance of this right to the international community is evident from the number of signatories to this treaty (154), and the re-affirmance of these rights by the United States and Mexico.

A conviction which is based upon evidence obtained in violation of this international right cannot be the result of a "fair" proceeding. The Due Process Clause is grounded upon the principals of fairness. The Courts of this nation have again and again recognized that the concept of due process and its application of various constitutional rights is premised on fundamental fairness. ***Ake v. Oklahoma***, 470 U.S. 68, 76-77, 105 S.Ct. 1087 (1985). ***See generally, Foster v. California***, 394 U.S. 440, 89 S.Ct. 1127 (1969); ***Rogers v. Richmond***, 365 U.S. 534, 81 S.Ct. 735 (1961); ***Napue v. Illinois***, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959); ***Dispensa v. Lynaugh***, 847 F.2d 211, 218 (5th Cir. 1988); ***and, Ex parte Brandley***, 781 S.W.2d 886 (Tex.Cr.App. 1989). The Court of Criminal Appeals has held so as well. ***Brown v. State***, 977 S.W.2d 328, 333 (Tex.Cr.App. 1996) (Keller, J., concurring); ***Reese v. State***, 977 S.W.2d 328, 333 (Tex.Cr.App. 1994); ***and***,

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39. And the burden placed upon authorities to provide such information is no real burden. Indeed, under Tex. Crim. Proc. art. 26.13 (4) the trial judge is required to admonish any defendant that "the fact that the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law." Surely a requirement that law enforcement officers advise a foreign nation of the right to contact a Consular is no more burdensome than that burden the Legislature placed on the Courts in art. 26.13.

Cook v. State, 940 S.W.2d 623, 630 (Tex.Cr.App. 1996) (Baird, J., concurring and dissenting).

Applicant would respectfully show this Court that the State, by securing a conviction and death sentence with evidence obtained in violation of the Vienna Convention on Consular Relations, rendered the proceedings herein "fundamentally unfair."